

**TORRES & GARCÍA, P.S.C.**  
ATTORNEYS AND COUNSELORS AT LAW  
ENVIRONMENTAL, NATURAL RESOURCES, AND LAND USE

RANCIS TORRES-FERNÁNDEZ  
RAULIO GARCÍA-JIMÉNEZ  
KARÍN G. DÍAZ-TORO  
RAÚL NEGRÓN-CASASNOVAS  
EUGENE SCOTT-AMY

PO BOX 19539  
SAN JUAN, PUERTO RICO 00910-1539

705 FERNÁNDEZ JUNCOS AVENUE  
SAN JUAN, PUERTO RICO 00907-4226  
TELEPHONE 787-721-8220  
TELECOPIER 787-721-8223  
[HTTP://WWW.ENVIROLAWPR.COM](http://www.envirolawpr.com)

**SETTLEMENT COMMUNICATION SUBJECT TO FED. R. EVID. 408**

July 29, 2011

Donald G. Frankel  
U.S. Department of Justice  
Environmental and Natural Resource Division  
Boston Field Office  
One Gateway Center  
Suite 616  
Newton Corner, MA 02458

**Re: Mitigating circumstances concerning the Arecibo Municipal Solid Waste  
Landfill- Gas Collection and Control System (GCCS)**

Dear Mr. Frankel:

In previous conversations concerning the above matter, I made reference to various mitigating circumstances occurring after the filing in May 5, 2003 of the original NMOC report by my client, Landfill Technologies of Arecibo (LTA), which may account for what EPA considers now to constitute a late filing of the GCCS design plan in August 2008 and an untimely construction and operation of the GCCS. The mitigating circumstances specifically relate to the "Operación Cumplimiento" initiative implemented by the Puerto Rico Environmental Quality Board (PREQB) in 2003<sup>1</sup>, and by a clarification made by PREQB in 2004 which changed the approved method for calculating landfill NMOC emissions in Puerto Rico<sup>2</sup>.

**Operacion Cumplimiento**

The "Operación Cumplimiento" initiative was PREQB's response for years of deficient municipal landfill operation and enforcement of the applicable environmental regulations in Puerto Rico. "Operación Cumplimiento" initiative

---

<sup>1</sup> By virtue of PREQB Resolution R-03-17-7 issued in June 12, 2003

<sup>2</sup> PREQB Resolution R-04-04-1 dated February 27, 2004

was sponsored by the PREQB and received EPA-Region 2's assertive endorsement and support<sup>3</sup>. Although Operación Cumplimiento addressed the adverse environmental conditions at thirty (30) municipal landfills in Puerto Rico, at EPA's request, priority was given to seven (7) municipal landfills which included the Arecibo MSW landfill<sup>4</sup>. The initiative involved the preparation of draft Compliance Plans by the affected landfills and the issuance of Consent Orders establishing compliance dates and stipulated penalties for non compliance. These Compliance Plans and Consent Orders were not limited to RCRA Subtitle D matters but to all applicable environmental requirements.<sup>5</sup> The scheme included monetary reimbursements by the Puerto Rico Solid Waste Management Authority (SWMA) of the cost of implementation of certain corrective measures at the selected landfills in order to assist the municipalities in their compliance efforts.

In the specific case of the Arecibo MSW landfill, LTA submitted to PREQB, as agent for the Municipality of Arecibo, a draft Compliance Plan in January 27, 2004 addressing the Operación Cumplimiento's Resolution requirements. The draft Compliance Plan was subsequently revised by LTA in February 27, 2004 and in March 2, 2004 in order to accommodate certain EQB comments and Clean Air Act<sup>6</sup> and Clean Water Act<sup>7</sup> requirements. The draft plan was subsequently revised again in April 29, 2004 in order to address certain comments and suggestions made by PREQB and EPA officials during a landfill inspection occurring in March 2004.

After several other correspondence exchanges between LTA and PREQB concerning the Arecibo MSW landfill draft corrective plan, a draft Order on Consent approving the draft revised Compliance Plan submitted by LTA was prepared by EQB and provided to LTA and Arecibo for execution by the Mayor of Arecibo.<sup>8</sup> After that event, all progress towards the execution of the Order on Consent stalled<sup>9</sup> between EQB, SWMA and the Municipality of Arecibo to the detriment of all. Due to the lack of progress in moving this matter forward by reasons beyond the control of LTA and considering that the protective shield<sup>10</sup> announced in the "Operacion Cumplimiento" program for municipal landfills may be compromised for lack of a formally approved compliance plan, LTA decided to proceed with the filing at PREQB of the GCCS design plan on August

---

<sup>3</sup> See, EPA letter dated March 18, 2004

<sup>4</sup> Idem

<sup>5</sup> Section IV(2)(d) of PREQB Resolution R -03-17-7

<sup>6</sup> Specifically the installation of a landfill gas collection and control system

<sup>7</sup> Installation of a sanitary wastewater tank

<sup>8</sup> Hon. Lemuel Soto

<sup>9</sup> Apparently due to political reasons

<sup>10</sup> Under Operación Cumplimiento no penalties would be assessed for the violations to applicable requirements covered under the pertinent compliance plans

14, 2008. This protective filing would have sheltered its client from the possibility of any future determination of noncompliance associated with this matter.

As stated under separate cover, under the contract executed by LTA for the operation and management of the Arecibo MSW landfill, LTA did not assume any obligations involving capital improvements other than those required by applicable law at the time the parties signed the contract. Consequently, there was no contractual obligation in the part of LTA to perform capital improvements related to the installation and operation of a GCCS at the time the parties entered into the agreement. LTA's good faith filing of the GCCS Design Plan in 2008 could not be interpreted as an acknowledgement that the capital improvements related to the GCCS requirements were attributed to LTA under the contract because those requirements were not "applicable law", as the term is explicitly defined under the contract, on the effective date of the contract on July 12, 1999.<sup>11</sup>

After a couple of months of evaluation, in October 17, 2008, EQB requested LTA's consultant by fax additional information as part of their review of the GCCS design plan. Such information was provided in November 12, 2008. The GCCS design plan was subject to numerous other information exchanges<sup>12</sup> and meetings between LTA's consultant and PREQB until February 10, 2010 in which LTA's consultant met with EQB's engineer evaluating the plan in a follow up meeting to expedite its approval, at the meeting, LTA's consultant was informed that EQB had stopped the plan evaluation at EPA's specific instructions as EPA had taken over the project. LTA's consultant was informed at that time that at EPA's request EQB would not proceed with the approval of the GCCS Design Plan.

It was not until June 1, 2010 that LTA received EPA comments on the draft GCCS Design Plan. Fortunately, the GCCS is now under construction and expected to be operational before the end of this year.

LTA respectfully alleges that the "Operacion Cumplimiento" circumstance surrounding the Arecibo landfill be considered by DOJ/EPA and consequently readjust accordingly its proposed penalty calculation.

### **EQB's clarification on NMOC emission calculations**

---

<sup>11</sup> LTA's voluntary undertaking should only be interpreted as a good faith effort to achieve compliance.

<sup>12</sup> The last set of information requested by EQB on the draft GCCS plan was provided by LTA's consultant in November 3, 2009

In the RCAP Part VII rules implementing Subpart GGG requirements, landfills were instructed to make NMOC calculations through the use of certain equations and default parameters. Rule 704(a) established that MSW landfills must conduct NMOC emission estimates using the values of 4000 ppmv for the concentration of NMOC, 170 cubic meters for the potential for methane generation from each megagram of deposited waste at a landfill, and 0.05 as the constant methane generation rate. These were the values that LTA used in 2003 when it reported that the NMOC emission exceeded 50 megagrams which triggered the subsequent GCCS requirements.

However, in February 27, 2004 the PREQB issued a Resolution that modified the above mentioned default values for the calculation of NMOC emissions. Although this resolution was addressed to a particular waste company in Puerto Rico, it was informed to and circulated amongst the landfill regulated community in the Island.

In the 2004 Resolution, EQB changes that abovementioned default values by adopting those set forth in the following EPA publications:

1. Air Emissions from Municipal Solid Waste Landfills-Background Information for Proposed Standards and Guidelines, U.S.EPA (EPA-450/3-90-011a) (NTIS PB 91-197061) and
2. Municipal Solid Waste Landfill New Source Performance Standards (NSPS) and Emission Guidelines (EG)—Questions and Answers (Revised 5/02)

As a consequence of such adoption, affected facilities were instructed to calculate NMOC emissions using the default value of 595 ppmv for the concentration of NMOC, 100 cubic meters for the potential for methane generation from each megagram of deposited waste at the landfill and 0.02 and 0.04 as the constant methane generation rate depending on the site's rain accumulation rate. These changes caused much confusion amongst the regulated community in Puerto Rico. In the case of LTA, it was assumed that the NMOC report submitted in 2003 was superseded by the 2004 NMOC emission report that was based in the new adjusted default values. The 2004 NMOC report reflects values well below 50 megagrams of NMOC /year.

This confusion was clarified when EQB informed the members of the regulated community at a later date that the new default values were applicable only to the emission calculations for purposes of emission fees payment and not for determining NMOC emission under RCAP Rule 704(a). LTA respectfully purports that this circumstance surrounding the confusion created by EQB's 2004 Resolution changing the NMOC default values be assessed and considered by DOJ/EPA and consequently readjust accordingly its proposed penalty calculation.

We will appreciate your consideration of these important factors that support LTA's position that it was not responsible for the delay in the GCCS installation and also request their proper evaluation and weight for purposes of adjusting the gravity component elements accordingly. Please let us know if you have any questions or need additional information.

Cordially,

A handwritten signature in black ink, appearing to read 'Francis Torres', with a stylized flourish at the end.

Francis Torres

- c. Carolina Jordán García, EPA
- Lourdes Rodríguez, EPA
- Hon. Lemuel Soto, Municipality of Arecibo
- Eliezer Aldarondo and Marla Hadad, Counsels for Arecibo
- Rey Contreras, LTA
- Javier Vázquez, LTA